

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + Affidavit of Mailing

77-1132

To be argued by
JACOB LAUFER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1132

UNITED STATES OF AMERICA,

Appellee,

—against—

ARTHUR BERARDELLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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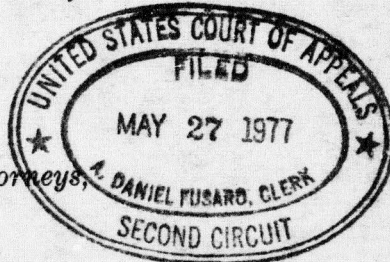


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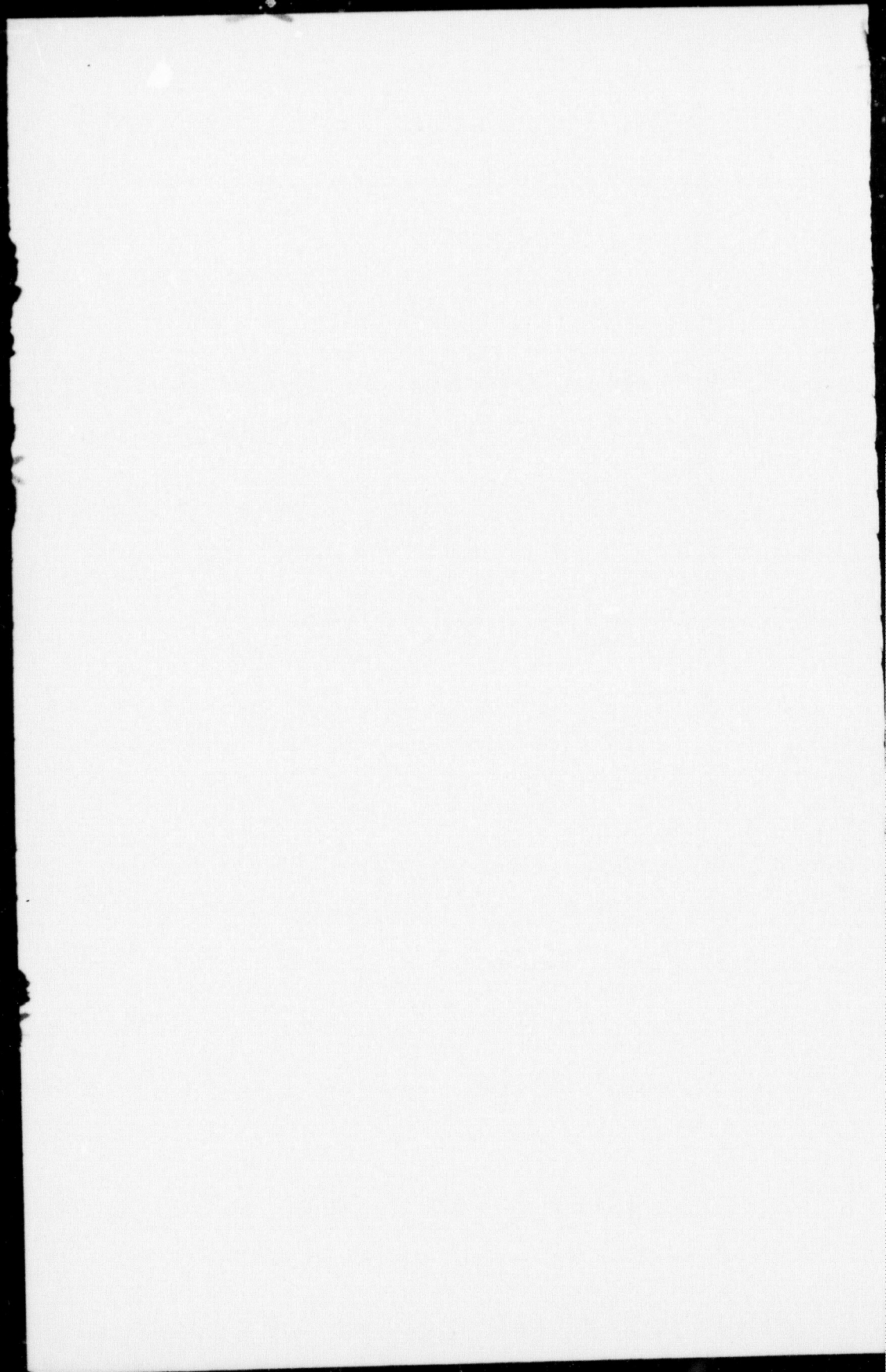
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1132

UNITED STATES OF AMERICA,

Appellee,

—against—

ARTHUR BERARDELLI,

Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Arthur Berardelli appeals from a judgment of conviction entered on March 4, 1977 in the United States District Court for the Eastern District of New York (John R. Bartels, *J.*) after a two day jury trial, which judgment convicted appellant of criminal contempt. Appellant was sentenced to a five year term of imprisonment. He is currently on bail pending this appeal.

An Order signed by Judge Bartels issued on November 17, 1976, directing Berardelli to show cause on November 29, 1976, why he should not be held in criminal contempt for having refused to testify during the November 1976 trial of *United States v. Paul Castellano, et al.*, 75-CR-521 (E.D.N.Y.). The Order to Show Cause was issued pursuant to 18 U.S.C., § 401(3). The trial commenced on November 29, 1976 and concluded on November 30, 1976, when the jury found Berardelli guilty of criminal contempt.

On February 9, 1977, a sentencing hearing was conducted at which both the Government and Berardelli presented evidence. On March 4, 1977, as stated, Berardelli was sentenced to a five year prison term.

On appeal, Berardelli raises essentially five issues: (1) whether the grant of use immunity effectively supplanted his Fifth Amendment privilege against self-incrimination; (2) whether Judge Bartels properly denied his application for a continuance; (3) whether Judge Bartels correctly refused to recuse himself from conducting the trial; (4) whether the sentence imposed by Judge Bartels should be modified by this Court; and (5) whether Judge Bartels correctly charged the jury on the issues of intent and the availability to Berardelli of his Fifth Amendment privilege as a defense.

Statement of Facts

A. The Government Case

On November 8, 1976, the trial of *United States v. Paul Castellano, et al.*, 75-CR-521,¹ commenced before the Honorable John R. Bartels, United States District Judge for the Eastern District of New York.

¹ While Indictment 75-CR-521, filed in the Eastern District of New York on June 30, 1975, contained 14 counts, the Court in two pre-trial orders directed a severance of Counts 3-14, and thus the cause on trial was limited to counts 1 and 2. These counts charged several defendants with operating an illegal enterprise which consisted of a group of individuals associated in fact for the purpose of lending sums of money at usurious rates of interest, in violation of Title 18, United States Code, Section 1962(c) (Count 2); and charged all of the defendants on trial with conspiring to operate the illegal enterprise, in violation of Title 18, United States Code, Section 1962(d) (Count 1).

On November 10, 1976, the Government called as its second witness one Arthur Berardelli.² After some initial discussions between the Court, the Government, Berardelli, and Robert Sgarlato, Berardelli's attorney (see Tr. 125),³ Berardelli was sworn as a witness (Tr. 102).

In response to the first question posed to him by the prosecutor, Berardelli asserted his Fifth Amendment privilege as to "any questions pertaining to this matter" (Tr. 102). Pursuant to the Government's application, the Court then conferred upon Berardelli, "use" immunity pursuant to 18 U.S.C. § 6003, both explaining and reading the immunity order (Tr. 102-06).

Berardelli was again questioned whether he was familiar with one of the defendants on trial, and once again declined to answer that and further questions (Tr. 107). In response to a direct order from the Court to answer questions, Berardelli persisted in his refusal (Tr. 107). Berardelli was found in civil contempt of Court, and immediately remanded for the duration of the trial, subject to his willingness to purge himself of the contempt (Tr. 107).

On November 15, 1976, upon the Government's application, the Court directed that Berardelli be produced once again in an effort to elicit his testimony. Berardelli was advised by the Court of the criminal contempt sanctions to which he might become exposed should he persist

² Berardelli had testified, without a formal grant of immunity before the federal grand jury that had filed the indictment in the *Castellano* case. This testimony was crucial to this indictment and he was an essential trial witness.

³ "Tr." refers to trial transcript; "Tr." followed by a date refers to the transcript of post-trial proceedings on the noted date; "A." refers to Appellant's appendix; "GX" refers to Government Exhibits; "App. Br." refers to Appellant's brief.

in his refusal to testify (Tr. 108-10). Questions were once again put to him by the Government's attorney, to which he again declined to respond (Tr. 110-11, 116), notwithstanding orders by the Court that he do so (Tr. 111, 116). Berardelli acknowledged his awareness of the absence of a privilege against self-incrimination in light of the order of immunity (Tr. 112). Berardelli's attorney asserted that Berardelli would not testify because he was not immune from a later perjury prosecution based upon his trial testimony (Tr. 114-15).⁴

B. The Defense Case

Berardelli testified on his own behalf. He stated that while he understood a portion of Judge Bartels' order and explanation of the law, he "didn't understand the part about perjury" (Tr. 138-39, 146). He stated that he had previously given testimony before the grand jury which was untrue (Tr. 140, 148), and felt that if he corrected those untruths at trial, the Government would prosecute him for perjury (Tr. 140-147). Berardelli stated that he had been incarcerated for seven or eight days for civil contempt (Tr. 149).

On cross-examination, Berardelli conceded that he had been cautioned by the Court that by continuing to refuse to testify, he was subjecting himself to a charge of criminal contempt (Tr. 150). Berardelli acknowledged that he had been promised by numerous Government representatives that if he gave truthful testimony before the grand jury, he would not be prosecuted for his involvement in loansharking transactions (Tr. 156-59). He reiterated that he fully understood Judge Bartels' recita-

⁴ Additionally, Berardelli's counsel requested "complete transactional immunity", (Tr. 125), and claimed that Berardelli had given his grand jury testimony after being threatened with a long term of imprisonment (Tr. 125).

tion of the immunity order "except the part of perjury" (Tr. 159-168). Berardelli denied being aware that he could purge himself of his civil contempt by testifying; and that if he refused to testify, he could be punished for criminal contempt (Tr. 170-72). Berardelli acknowledged that he had responded affirmatively at the *Castellano* trial when advised by the Court that he had been given immunity (Tr. 174), but did not recall being told he could "not be prosecuted for any statements you make in this case" (Tr. 175).

C. The February 9, 1977 Sentencing Hearing

During the course of the hearing, the Government presented affidavits of Jacob Laufer (who also testified) and Michael C. Eberhardt, two federal prosecutors who dealt with Berardelli during the course of his relationship with the Government. Also testifying on behalf of the Government were William I. Aronwald, formerly Attorney-in-Charge of the New York Strike Force, and James K. Kallstrom, Special Agent, Federal Bureau of Investigation, and Frank Frattolillio and Patrick J. Convery, Special Agents, Internal Revenue Service.

The Government established that during July, 1973 while Berardelli was a defendant on trial before Hon. Constance B. Motley, United States District Judge for the Southern District of New York, he and his attorney Thomas Concannon, Esq. of the Legal Aid Society, contacted the Government and proffered cooperation against Paul "Big Paul" Castellano and others (Eberhardt Aff.; Tr. 47, 50, 52).

In return for his cooperation, the Government made known his cooperation to District Judges Motley (73 Cr. 79), Carter (73 Cr. 471) and Gurfein (73 Cr. 747) of the Southern District of New York, before each of whom Berardelli had been convicted. Berardelli received pro-

bationary sentences from Judges Carter and Gurfein; Judge Motley sentenced him to a two year prison term. A fourth indictment (73 Cr. 929), also pending in the Southern District of New York, was dismissed as to Berardelli.

During Berardelli's incarceration, the Government arranged for an expedited parole hearing, and in late September, 1975, Special Attorney Eberhardt personally appeared on Berardelli's behalf at a local hearing, and the Government directed a letter to the Regional Board of Parole. In ^{fact} instance, the Board of Parole was advised of Berardelli's substantial cooperation. Berardelli was subsequently released on parole in November 1975 (Eberhardt Aff.).

It was agreed that Berardelli would not be prosecuted for his involvement in the Castellano loansharking operation if it were determined that he had been fully cooperative with the Government. It was further agreed that should it become necessary, Berardelli and his family would be afforded the full security of the Federal Witness Protection Program. (Eberhardt Aff.).

During the ensuing two year period, Berardelli testified before Federal and New York State Grand Juries. (Tr. 11-12). He was debriefed well in excess of 50 occasions by Special Agents of the Federal Bureau of Investigation and Internal Revenue Service (Tr. 12). Based upon Berardelli's information, the Government applied for three Court orders authorizing electronic surveillances. The orders were implemented on each occasion. Search warrants were executed, and on four occasions consensual electronic surveillance was undertaken. Numerous interviews were conducted (Tr. 48, 51, 52, 54-55).

The *Castellano* prosecution was instituted on June 30, 1975, principally upon Berardelli's anticipated testimony which was corroborated in many particulars (Tr. 6-7).

In sum, Special Agents of the Federal Bureau of Investigation devoted at least 2,000 man-hours to the investigation precipitated by Berardelli's cooperation (Tr. 49); Internal Revenue Service Special Agents devoted 740 man-hours (Tr. 51, 55). The government attorneys assigned to the case devoted an estimated 900 man-hours. (Laufer Aff.).

While Berardelli had on two occasions, during the course of his cooperation, stated that he was unwilling to testify, (Tr. 40-41) he met with Government attorneys during late January or early February 1976. At that time he advised that he had voluntarily left the Federal Witness Protection Program because he wanted to be with his wife and two children who had declined to be relocated. Berardelli at that time reaffirmed his willingness to testify (Tr. 31, 34-35).

During March or April 1976, Berardelli met with government attorney Jacob Laufer and reaffirmed the substance of his testimony before the Federal Grand Jury (Tr. 6).

Again during June, 1976 when Judge Bartels ordered a deposition taken of Berardelli's testimony upon Government application under 18, U.S.C. § 3503, (the order was later withdrawn by the Court, and no deposition was taken), Berardelli gave no indication that he would refuse to testify. In fact, he offered to meet with the Government attorney and F.B.I. Special Agent James K. Kallstrom at 4:00 a.m. on the morning of the anticipated deposition in order to review his testimony. He did not appear at that early morning appointment but was pres-

ent at the appointed time of the deposition. He gave no indication that he would refuse to testify. (Tr. 85-86, 105).

Similarly in October, 1976 when he was contacted by Special Agent Kallstrom for service of a trial subpoena he again made no mention of his unwillingness to testify. (Tr. 109-10).

The Government further established that its failure to establish a *prima facie* case during the *Castellano* prosecution was directly attributable to Berardelli's failure to testify. (Laufer Aff.).

Berardelli testified on his own behalf that he began cooperating while he was on trial before Judge Motley during 1973 (Tr. 61-64). On two occasions during his relationship with the Government he advised that he no longer wished to cooperate (Tr. 64). One of these occasions was in March 1975 and was caused by his wife's resistance to his cooperation. (Tr. 66-68). He stated that the Government advised him he would have to testify (Tr. 68-69, 70, 71, 74-75). Berardelli affirmed the substance of an affidavit filed in June, 1975 before Judge Motley in support of a motion to reduce sentence (Tr. 75-78) in which it was alleged that he had been harassed by the Government. After the filing of the affidavit in June 1975, Berardelli resumed his cooperation with the Government, because—according to his testimony—he had been advised by the Government that his life was in danger (Tr. 79-80), but stated, however, that no one had ever threatened his life (Tr. 80). In January 1976, he advised the Government that "if I'm subpoenaed, I'll do what I have to do," (Tr. 82) and never later advised the Government that he would refuse to testify. (Tr. 82-83). Berardelli acknowledged that during June 1976 he had made an early morning appointment to meet with then—Special Attorney Jacob Laufer and F.B.I. Special Agent

James Kallstrom in order to prepare for a deposition of his testimony, but had never intended to appear (Tr. 85-86). Berardelli reiterated that the reason he refused to testify was his fear that his wife would leave him (Tr. 88-89).

On cross-examination he testified that he began cooperating, with the advice of counsel, during July 1973 while on trial before Judge Motley (Tr. 89-94). He refused to state whether he had provided cooperation against "Big Paul" Castellano, because "I didn't answer questions against Mr. Castellano and I'm not going to answer them now." (Tr. 94). He testified that the first occasion on which he advised the Government he would not testify was between March 17-31, 1975, but acknowledged that he had worn consensual electronic surveillance equipment during a conversation with "Big Paul" Castellano on March 19, 1975 (Tr. 95-99). He then testified that his decision not to cooperate was not made until a few days later. (Tr. 98). He acknowledged that by March 1975, he had had numerous meetings with Government agents and attorneys and had precipitated Court-ordered electronic surveillance (Tr. 99-102).

While Aronwald had earlier testified that Berardelli had recanted to him the harassment allegations contained in his motion to reduce sentence (Tr. 26-27), Berardelli did not recall if he had had such a conversation (Tr. 102-03).

He recalled arranging an early morning meeting to prepare for his testimony at a proposed deposition, and that he failed to appear. (Tr. 105).

He did not advise Special Agent Kallstrom that he would not testify when, during October 1976, Kallstrom spoke with him regarding service of a subpoena for the Castellano trial. (Tr. 109-10).

ARGUMENT**POINT I****The Use Immunity Granted To Berardelli Was Co-Extensive With His Privilege Against Self-Incrimination, And His Refusal To Testify Was Without Justification.**

Berardelli contends that the grant of immunity under 18 U.S.C. § 6002, provided him by the order of the district court, was not co-extensive with his privilege against self-incrimination, and that he was therefore justified in his refusal to testify. This contention is devoid of merit.

It is by now well settled that a grant of use immunity pursuant to Section 6002 is "co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973); see also *United States v. Hinton*, 543 F.2d 1002, 1008 (2d Cir. 1976); *United States v. Kurzer*, 534 F.2d 511, 515-16 (2d Cir. 1976).

Nevertheless, Berardelli claims that since he had previously given non-immunized grand jury testimony, the immunity granted to him by order of the district court did not offer him adequate protection because "[t]he immunity granted to Berardelli, as extended by [*United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974)] would have permitted the Government to prosecute defendant for perjury in the grand jury, and to use the grand jury statements, if false, in a later prosecution for false statements committed during

his trial testimony" (App. Br. 12).⁵ The claim is untenable,⁶ since, as we demonstrate below: (1) his immunized trial testimony could *not* be used as proof of a prior act of perjury committed before the grand jury; and (2) he was *not* entitled to immunity from prosecution for perjurious testimony given pursuant to a grant of immunity under Section 6002.

With respect to the claim that his immunized trial testimony would have been admissible at a trial for perjury previously committed before the grand jury, it is evident that if the trial testimony were *truthful*, it would be inadmissible against Berardelli for *any* purpose, *United States v. Housand*, 550 F.2d 818, 822 (2d Cir. 1977); *United States v. Kurzer*, *supra*; 18 U.S.C. § 6002. The compelled trial testimony certainly could not be used to prove a previous act of perjury before the grand jury, *United States v. Patrick*, 542 F.2d 381, 385 (7th Cir.

⁵ Berardelli's cynical suggestion that had he been offered transactional immunity at the trial rather than immunity pursuant to 18 U.S.C. § 6002 *et seq.*, "*Berardelli*, we must assume, would have testified", (App. Br. 13), is utterly belied by his own admission at the post-trial sentencing hearing. In response to a question as to whether he had provided information relative to Paul Castellano during the course of the investigation, he responded "I didn't answer questions against Mr. Castellano and I'm not going to answer them now." (Tr. 2/9/77 at 94).

⁶ Berardelli also complains that his non-immunized grand jury testimony could have been used against him in a prosecution for the substantive charge of loansharking—the substance of his testimony (Br. 12). This complaint has no bearing upon any issue before this Court, and, in fact, Berardelli was advised from the outset that the informal immunity was voidable if he declined to cooperate with the Government. (*Eberhardt Aff.*).

⁷ Berardelli's apprehension of a forthcoming indictment for perjury was, at the time of the *Castellano* trial, speculative and premature, *Compare, Matter of Doe*, 546 F.2d 498 (2d Cir. 1976). In any event, had the Government returned an indictment against Berardelli for prior grand jury perjury it would have been faced with the "heavy" burden of both negating taint, and affirmatively

[Footnote continued on following page]

1976).⁷ On the other hand, if Berardelli gave *perjurious* testimony before the District Court, the Government's appropriate remedy would lie in a prosecution for *that* act of perjury, *United States v. Kurzer*, *supra*, 534 F.2d at 518; *United States v. Anzalone*, Dkt. No. 76-1458 (2d Cir. May 6, 1977), slip op. 3391, 3395.⁸

Recently, this Court noted that in the absence of a grant of immunity a witness might reasonably refuse to testify out of a fear of prosecution for previous perjury. *United States v. Housand*, *supra*, 550 F.2d at 823. The Court however, cited with approval the decisions of three other Circuits holding that a contrary result would obtain when the second testimony is compelled pursuant to a grant of immunity. *Id.*, citing *In re Bonk*, 527 F.2d 120 (7th Cir. 1975); *In re Grand Jury Proceedings*, 509 F.2d 1349 (5th Cir. 1975); *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973). Under such a circumstance, the witness is not justified in refusing to testify since the immunized testimony cannot be used to prove a *prior perjury*.

establishing that its evidence was "derived from a legitimate source wholly independent of the compelled testimony." *United States v. Nemes*, Dkt. No. 76-1584 (2d Cir. May 16, 1977) slip op. 3509, 3516, quoting from *Kastigar v. United States*, 407 U.S. 441, 460 (1972); *United States v. Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

⁸ Berardelli's argument that the effect of the *Tramunti* case, *supra*, which permitted the use of false compelled testimony for impeachment purposes, would here have sanctioned the use of the compelled trial testimony at a trial for grand jury perjury is illogical. The nub of his claim under the Fifth Amendment is that the testimony he would have given at trial would have been an inconsistent recantation of his grand jury testimony. If at some future date the Government obtained an indictment charging Berardelli with grand jury perjury, it would then be compelled to assert the truthfulness of Berardelli's immunized trial testimony. Under such a circumstance, the Government could scarcely attempt to establish the falsity of his trial testimony in order to gain its possible use as evidence under *United States v. Tramunti*, *supra*.

The second aspect of Berardelli's claim, *i.e.*, that he was justified in his failure to testify because his grand jury statements could have been used at a later prosecution for trial perjury, is similarly without merit. It has been consistently held that an immunized witness cannot avoid testifying by asserting that his testimony may be labelled perjurious and thereby "incriminate" him; the Fifth Amendment does not extend to any such claim. *Glickstein v. United States*, 222 U.S. 139, 141-42 (1911); *United States v. Anzalone*, *supra*, slip op. at 3394; *United States v. Tramunti*, *supra*; *In re Bonk*, *supra*; *Kronick v. United States*, 343 F.2d 436, 441 (9th Cir. 1965); *cf.*, *United States v. Housand*, *supra*, 550 F.2d at 823. See also, *United States v. Mandujano*, 425 U.S. 564, 577 (1976); *United States v. Kahan*, 415 U.S. 239 (1974); *United States v. Wilcox*, 450 F.2d 1131, 1140-41 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

Indeed, the United States Supreme Court noted in *United States v. Mandujano*, *supra*, 425 U.S. at 577, that the grant of immunity is a sufficient substitute for the Fifth Amendment privilege, and that perjury falls outside that grant. The Court went on to reaffirm that "immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." 425 U.S. at 570, quoting *Glickstein v. United States*, *supra*, 222 U.S. at 141-42.

It follows that Berardelli's Fifth Amendment claim is without merit and should be rejected by this Court.

POINT II

Berardelli Had No Reason To Fear An "Inconsistent Declarations" Perjury Prosecution.

Berardelli now contends on this appeal, for the first time," that his refusal to testify was justified because of a fear that an inconsistency between his grand jury testimony and the testimony he proposed to give at trial could precipitate a prosecution for a violation of 18 U.S.C., § 1623(c). This contention, which is merely a variant of his first point on appeal should be rejected for the same reason, *i.e.*, the compelled trial testimony is unusable by the Government for *any* purpose.

The principal purpose behind the enactment of Section 1623(c) was simply to eliminate the "two witnesses" rule pertaining to perjury prosecutions. *United States v. Patrick, supra*, 542 F.2d at 384-85 n.3, and authorities cited therein. That section thus permits the conviction of a defendant who has given conflicting testimonies without a specific finding of which of the conflicting testimonies was perjurious.

It is plain, however, that if the Government had indicted Berardelli for a violation of Section 1623(c), the prosecution would not withstand judicial scrutiny since as we have noted, had Berardelli given compelled testimony at the *Castellano* trial, that testimony could not be used against him (p. 11, *supra*) as affirmative proof that Berardelli may have committed perjury in the previous grand jury proceedings. *United States v. Patrick*,

* Since this issue was not presented to the Court below, this Court should decline to consider it. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

supra, 542 F.2d at 384-86; *United States v. Alter, supra*, 482 F.2d at 1028 (9th Cir. 1973); see *United States v. Housand, supra*, 550 F.2d at 823.¹⁰ Thus, the falsity of the grand jury testimony could not have been established with reference to the compelled trial testimony even if allegedly inconsistent. Cf., *United States v. Anzalone, supra*, slip op. at 3394; *United States v. Hinton, supra*.

Inasmuch as Berardelli could not be prosecuted for perjury before the Grand Jury under Section 1623(c), based on his compelled trial testimony, it follows that this so called "justification" for the refusal to testify was misplaced and should be rejected by this Court.

POINT III

The District Court Did Not Err In Denying Berardelli A Continuance: Berardelli Suffered No Prejudice From The Denial Of A Continuance.

On the morning of trial, Berardelli sought a continuance, contending that he was given insufficient notice that his trial would be conducted before a jury and that he would, therefore, be subject to a period in excess of six months' incarceration. This motion was denied and he argues that the District Court erred in denying him a continuance. We contend that it is plain, from the facts of this case, that Berardelli suffered no prejudice and that Judge Bartels did not abuse his discretion in denying the requested continuance.

As Berardelli has noted, during the course of the *Castellano* trial he was notified that the contempt hearing

¹⁰ Berardelli's intimation that this Court's opinion in *United States v. Tramunti, supra*, might change the result is as illogical with respect to this point as it is with respect to Point 1, *supra*.

would not involve a jury trial. (App. Br. 17). He conveniently fails to note, however, that on November 23, 1976, six days before the scheduled contempt trial, a letter containing the Government's proposed jury instructions was sent to the Court, with a copy to Berardelli's trial counsel. We submit that the substance of that letter,¹¹ as well as the enclosed jury instructions, gave Berardelli unequivocal notice of the impending jury trial. Berardelli's awareness that his trial would be before a jury is also shown by his trial counsel's evident lack of surprise when Judge Bartels first called for a jury panel on the morning of trial (Tr. 3-4). It was only when his motions to dismiss were decided adversely to him that he applied for a continuance (Tr. 48). Moreover, Berardelli failed to timely request for a continuance but instead elected to make his application on the morning of trial. Judge Bartels, in denying the motion, characterized this tactic as "pure gamesmanship." (Tr. 52).

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* * *

November 23, 1976

Re: *United States v. Arthur Berardelli*

Dear Judge Bartels:

Enclosed please find the charge of the Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, in *United States v. Huss and Smilow*, 73 Cr. Misc. 24 and 25, *affirmed without opinion*, 506 F.2d 1395 (2d Cir. 11/27/74). The government requests that the Court give the same or a similar charge in regard to above referenced case.

We wish to point out to your Honor that *Huss and Smilow* likewise involved a criminal contempt case which was tried before a jury pursuant to Title 18, United States Code, Section 401(3).

Respectfully,
 PETER D. SUDLER
Special Attorney
 U.S. Department of Justice

Enc.

cc: Robert A. Sgarlato, Esq.

It is significant that there was no claimed prejudice in the District Court nor in this Court. This is appropriately so because of the singularly simple nature of this case. The evidence was presented in one afternoon, by both the Government and the defense, and totalled only eighty transcript pages (Tr. 97-177). It is worthy to note that counsel was not called upon to make an opening until after the luncheon recess, and it is only this statement which distinguished the jury trial from a non-jury one for which counsel was *concededly* prepared. (Tr. 51).¹²

The Government's case (Tr. 97-132), consisted wholly of a reading of transcripts of the *Castellano* proceedings during which Berardelli refused to testify, proceedings during which trial counsel was present. Moreover, there is no claim that counsel did not have adequate time to review these transcripts. After Berardelli testified on his own behalf (Tr. 132-77), the Court, upon a defense request, adjourned the trial until the next day in order to prepare for summations, which were given the following day. (Tr. 177).

It is well established that a motion for a continuance is directed to the sound discretion of the trial court, *Ungar v. Sarafite*, 376 U.S. 575, 539 (1964); *Avery v. Alabama*, 308 U.S. 444 (1940); *Isaacs v. United States*, 159 U.S. 487 (1895); *United States ex rel. Lucas v. Regan*, 503 F.2d 1, 3 (2d Cir. 1974), *cert. denied*, 420 U.S. 939 (1975), which will not be disturbed unless a clear abuse is shown. *United States v. Houlihan*, 332 F.2d 8, 15 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964); *United States v. Bentvena*, 319 F.2d 916, 934-35 (2d

¹² Of course, it is not inappropriate for a nonjury trial to begin with opening statements. Thus, counsel really had nothing to complain about.

Cir. 1963), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1964). Under the facts of this case there was plainly no abuse of discretion in denying Berardelli's motion for a continuance.

United States v. Gordon, 253 F.2d 177, 180 (7th Cir. 1958), heavily relied upon by Berardelli, is easily distinguishable. There, the Court dismissed an indictment, under 18 U.S.C., § 659, for failure to allege the value of the stolen goods, and hence, the seriousness of the crime. There the Court held that Gordon did not know that the offenses charged constituted felonies. Under these circumstances, it was held that the indictment was defective. This case has no discernible application here where there was no challenge, here or below, to the sufficiency of the Order to Show Cause which bottomed the instant prosecution. The criminal contempt of which Berardelli stands convicted is a *suis generis* offense which was appropriately charged and proven. *Green v. United States*, 356 U.S. 165, 183-87 (1958); *Myers v. United States*, 264 U.S. 95, 104-05 (1924); *United States v. Bukowski*, 435 F.2d 1094, 1099-1103 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

POINT IV

The Court Correctly Refused To Recuse Itself.

Berardelli claims that Judge Bartels erred when he did not recuse himself and assign the trial of this case to another district judge. Related to this is the claim that Judge Bartels improperly asserted himself during the trial. These claims, we contend are frivolous.

At ten minutes before noon on the morning of trial, defense counsel first orally moved for recusal of the trial judge. The sole basis of the recusal motion was that Judge Bartels had earlier found Berardelli in civil con-

tempt (Tr. 53-54). There was no mention, either then, or at any other time throughout the trial, that Judge Bartels was being unfair to Berardelli or was improperly asserting himself by his "aggressive questioning of Berardelli concerning defendant's understandings of the scope of the Court's immunity order" (App. Br. 18-19). The failure to object on the ground now asserted as error on appeal, that Judge Bartels allegedly aggressively questioned defendant, waived the point for purposes of appellate review. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Moreover, we contend that it is indicative of the specious nature of this claim.

Berardelli's recusal claim was waived by his failure to comply with the requirements of 28 U.S.C. § 144¹³ which requires that in order for a party to establish a proper basis for recusal by the district court he must make and file:

"... a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . .

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed *not less than ten days* before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for

¹³ Berardelli's argument also fails when measured against Title 18, *United States Code*, Section 455(b)(1) which requires a judge to disqualify himself "[w]here he has a personal bias or prejudice concerning a party. . ." Such a decision "is generally 'a matter confided to the conscience of the particular judge.'" *Weiss v. Hunna*, 312 F.2d 711, 714 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963); *United States v. Patrick*, *supra*, 542 F.2d at 390-91, and Berardelli advances no justification for his bold assertion that Judge Bartels erred in refusing to recuse himself.

failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (emphasis supplied).

Berardelli did not comply with section 144 and there was thus nothing before the district court to support his claim of prejudice, or that such prejudice stemmed from an extrajudicial source. See *Berger v. United States*, 255 U.S. 22 (1921); *United States v. Bernstein*, 533 F.2d 775, 784-85 (2d Cir.), cert. denied, — U.S. — (1976); *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968); *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966).

Lacking a basis for the motion Judge Bartels, we contend, complied with the well-settled legal maxim that in the absence of a legally sufficient basis for recusal, there is an affirmative obligation on the part of the district judge *not* to recuse himself. *Rosen v. Sugarman*, supra, 357 F.2d at 799; *Wolfson v. Palmieri*, supra, 396 F.2d at 124; *Hodgson v. Liquor Salesmen's Union*, 444 F.2d 1344, 1348 (2d Cir. 1971).

In addition to failing to provide a timely and sufficient affidavit or any affidavit whatsoever, the only reason presented by Berardelli to support his request for recusal was the fact that Judge Bartels had presided over his civil contempt proceeding.¹⁴ This is no basis whatsoever for the drastic remedy of recusal on the part of the district judge and no case has so held. See *United*

¹⁴ Berardelli's assertion that Judge Bartels erred by asking questions of him is frivolous. Judge Bartels "was doing no more than asking such questions as would serve the ends of justice by assisting the jury in understanding the evidence." *United States v. Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976).

States v. Grinnell Corp., 384 U.S. 563, 583 (1966) wherein the Supreme Court stated:

"The alleged bias and prejudice to be disqualified must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case."

No such allegation was made or could have been made by Berardelli, and it follows that this contention should be rejected.

POINT V

Berardelli's Five-Year Sentence Should Not Be Reduced.

Berardelli submits that his five year prison sentence was excessive and should therefore be reduced by this Court.¹⁵ The Government respectfully disagrees and urges that the sentence imposed by the District Court be maintained.

In support of his plea for a sentence reduction, Berardelli submits five factors in mitigation of his conduct. The first is his assertion that his refusal to testify was not done with malicious intent. This and other issues were the subject of a sentencing hearing held by the District Court on February 9, 1977. As a result of that hearing and the entire proceedings before him, Judge

¹⁵ The Government acknowledges that this Court possesses authority to revise a criminal contempt sentence imposed under Section 401(3). *Green v. United States*, 356 U.S. 165 (1958); *Mitchell v. Fiore*, 470 F.2d 1149, 1155 (3d Cir. 1972), *cert. denied*, 411 U.S. 938 (1973).

Bartels made numerous findings of fact (Tr. 3/4/77 at 27-33)¹⁶ with regard to Berardelli's refusal to testify

¹⁶ The entire findings of the Court are as follows:

The Court: It is a crime against the public when you interfere with the administration of justice. I don't know of any greater crime. People must realize that things like this cannot go unpunished.

Arthur Berardelli, before imposing sentence upon you let me outline some of the considerations and facts that have occurred to me.

You have already had a hearing February 2nd [sic] which explored your reasons for refusing to testify and indeed, you had a contempt proceeding which also gave you an opportunity to give your reasons for refusing to testify.

According to the record:

1. Arthur Berardelli first agreed to cooperate with the government in July of 1973.

2. In November, 1973 Arthur Berardelli gave testimony before a grand jury which was in large measure responsible for the indictments handed down in *United States v. Paul Castellano et al.*, 75 CR 521.

3. Arthur Berardelli rendered assistance to the government in its investigation of the defendants in that case, and several times consented to wear a concealed tape recorder and microphone while engaging certain of the defendants in conversation.

4. Before the trial Arthur Berardelli was aware that the government had expended a significant amount of time and effort in its investigation.

5. The testimony of Arthur Berardelli was crucial to the government's case against most of the defendants in the *Castellano* case, and Berardelli must have been aware of this.

6. While Arthur Berardelli on occasion indicated that he had misgivings about continuing to cooperate with the government, he never, prior to trial, informed the government that he would not continue to cooperate by testifying at trial as he did before the Grand Jury.

7. At the crucial point in the trial of *United States v. Paul Castellano et al.*, when Berardelli was called to testify, he refused to do so.

[Footnote continued on following page]

8. After he was granted immunity he continued to refuse to testify on the grounds that if he told the truth at trial, such testimony could be used to prosecute him for the "perjury" he assertedly committed when he testified before the Grand Jury. Berardelli persisted in his refusal to testify even after the Court ordered him to testify.

9. Upon his refusal to obey the Court's order to testify, Berardelli was immediately incarcerated for civil contempt. He persisted in his contumacious conduct several days later when he was recalled to the stand and given a chance to purge himself. In this Court's opinion, his refusal to testify necessitated the dismissal of the indictments against the defendants at trial.

10. Arthur Berardelli was subsequently found guilty of criminal contempt after a trial by jury, the jury having found beyond a reasonable doubt that Berardelli actually did understand the extent of the immunity granted to him when he refused to testify.

11. A special sentencing hearing was held to permit the government to show the extent of the damage caused by Berardelli's refusal to testify and to permit Berardelli to explain his conduct.

12. Berardelli's information triggered the government's investigation and a total of approximately 3600 man-hours were expended by the attorneys for the United States, the Federal Bureau of Investigation, the Internal Revenue Service and the Treasury Department in their investigation of *United States v. Paul Castellano*.

13. After consideration of the testimony of the attorneys for the United States involved in the case, the investigating Federal agents and of Berardelli, the Court has concluded that there were no extenuating circumstances in mitigation of Berardelli's conduct.

14. The mere fact that Berardelli waited until the jury was impaneled and then refused to testify permitted the defendants to leave this court free of any threat of ever being tried again because jeopardy had attached to them; whereas, if Berardelli had indicated before the trial that he wasn't going to testify the government would have had an opportunity to decide whether or not they would impanel the jury and whether or not they would permit jeopardy to attach to the *Castellano* defendants.

15. In particular, Berardelli never stated nor implied that he refused to testify for fear of his life. Berardelli

[Footnote continued on following page]

was offered and took advantage of the United States' Witness Protection Program for a time, but voluntarily left the program.

16. The Court notes, however, that Berardelli's wife, who is related to two of the defendants in the *Castellano* case (Little Paul Castellano and Frank Guglielmini), refused to agree to relocate as part of the Witness Protection Program. According to the pre-sentence report:

"The defendant (Berardelli) claimed that the primary reason for his ultimate refusal to testify at trials was the anguish and hurt he had caused his wife by giving evidence against members of her family. He further advised that his wife had called him a 'rat' and expressed her belief that his cooperation was wrong."

17. The Court does not believe that the government improperly harassed Berardelli by threatening him with future prosecutions in the event he failed to cooperate, since such possible prosecutions are inherent in any agreement between the government and a cooperating witness who would otherwise face prosecution.

18. The Court is convinced that Berardelli could not have believed that his agreement with the United States obligated him to testify solely before the Grand Jury and not at trial, as Mr. Sgarlato has suggested by his line of inquiry.

This is a particularly flagrant case of contempt which has caused a loss of time and energy not only on the part of the government and its agents but also on the part of the Court. This prosecution has also cost the government a considerable amount of money—all to no avail.

It is my opinion that conduct like this really threatens the very fabric of the administration of justice.

Arthur Berardelli, on your conviction of guilty to criminal contempt of court, 75 Cr. 521, I sentence you to the custody of the Attorney General or his duly authorized representative who shall designate the place of confinement for a period of five years, pursuant to Rule 32(a)(2) of the Federal Rules of Criminal Procedure.

I wish to advise you that you have a right to appeal and if you are unable to pay the cost of such appeal you may apply to the Court for leave to apply in forma pauperis. Notice of appeal must be filed within 10 days from the time sentence is entered.

[Footnote continued on following page]

during the trial. The Court found and concluded "that there were no extenuating circumstances in mitigation of Berardelli's conduct;" that Berardelli was purposefully remiss in not advising the Government of his intention not to testify, thereby permitting the impanelment of the jury and the attachment of jeopardy; and that as a direct result of Berardelli's refusal to testify, the indictment against all of the defendants at trial had to be dismissed. Under these circumstances, Berardelli's appellate assertion that his refusal to testify was not maliciously motivated should be rejected as disingenuous.

Berardelli next submits that his refusal to testify was prompted, in good part, by the advice of his counsel. Curiously, however, at no point during the sentencing hearing did Berardelli or his counsel ever assert that Berardelli's refusal to testify was based upon advice of counsel. In fact, trial counsel, on three separate occasions, advised the Court that Berardelli's refusal to testify was not upon his advice. (Tr. 25, 31, 189). Thus, although reliance on advice of counsel may be a factor properly considered in mitigation, this was not the case here. And, of course, reliance on the advice of counsel is not a defense to a charge of criminal contempt. *United States v. Snyder*, 429 F.2d 520, 522 (9th Cir. 1970), *cert. denied*, 400 U.S. 903 (1971); *Eustace v. Lynch*, 80 F.2d 652, 656 (9th Cir. 1935); *Taylor v. United States*, 221 F.2d 809, 810 (6th Cir.), *cert. denied*, 350 U.S. 834 (1955); *In re Door*, 195 F.2d 766 (D.C. Cir. 1952); *United States v. Goldfarb*, 167 F.2d 735 (2d Cir. 1948) (*per curiam*). Thus, this reason, we submit is without merit.

For the reasons I have stated I think this sentence is necessary to rehabilitate Mr. Berardelli and also to deter such actions under similar circumstances by any other witnesses and to prevent others in similar circumstances from defying United States Court orders made by judges in any trial of any case requiring such witnesses to testify.

Thirdly, Berardelli disingenuously contends that his refusal to testify was motivated by fear for his personal safety and that of his family, notwithstanding his denial, under oath, that he had been threatened. (Tr. 2/9/77 at 80). We again respectfully refer this Court to the sentencing findings made by Judge Bartels. Specifically, the Court found that Berardelli never once stated nor implied during his trial or the events that preceded it that he refused to testify for fear of his life. (p. 23, *supra*). Berardelli's fourth claim is that his wife would have refused to relocate with him had he testified. We submit that the ill will of the defendant's wife does not rise to the level of a mitigating circumstance justifying Berardelli's conduct, especially in view of the fact that Berardelli was necessarily aware of the problem from the outset of his cooperation with the Government.¹⁷ Thus, under the circumstances, Berardelli led the Government on until he was called as a witness at the trial and then simply refused to testify.

Lastly, Berardelli contends that, in fact, he had provided substantial cooperation to the Government and had testified in an unrelated criminal proceeding subsequent to his contempt. We again refer this Court to Berardelli's answer to a question asked of him at the sentencing hearing concerning his willingness to provide information against the Castellano's:

"I didn't answer questions against Mr. Castellano and I'm not going to answer them now." (Tr. 2/9/77 at 94).

¹⁷ It was established and found by the District Court that Berardelli was offered and took advantage of the "Witness Protection Program", pursuant to which he was relocated to another area of the country and given a new identity. Berardelli voluntarily left the program. The District Court noted in this regard that Berardelli's wife is related to two of the defendants in the *Castellano* case.

Berardelli's refusal to testify was not based upon any of the pretexts set forth in his brief, but rather was an example of conduct designed to thwart and frustrate the administration of justice. As Judge Bartels noted:

"This is a particularly flagrant case of contempt which has caused a loss of time and energy not only on the part of the government and its agents but also on the part of the Court. This prosecution has also cost the government a considerable amount of money—all to no avail.

It is my opinion that conduct like this really threatens the very fiber of the administration of justice."

We respectfully submit that Judge Bartels was correct and that Berardelli's conduct not only threatened the fabric of the administration of justice, but in this case, destroyed any true administration of justice.

Berardelli's final claim is that the sentence he received, as compared to sentences received by other defendants convicted of contempt, was excessive. This claim is easily disposed of by reference to a decision by the Seventh Circuit where a four year sentence was imposed upon a defendant when he had testified before a grand jury but refused to testify at trial. *United States v. Patrick, supra*, 542 F.2d at 393. The Court noted in *Patrick*:

"... Where an individual has been indicted primarily as a result of a witness' grand jury testimony, the effects on the criminal justice system can be damaging when courts are not given the power to impose severe sanctions for subsequent contumacious conduct on the part of the witness. For example, if Patrick's accusations were false, he subjected O'Hara to a criminal indictment and its resulting expense and embarrassment without giving O'Hara the opportunity to confront such allegations and obtain the proper vindication. If,

in fact, Patrick's allegations were true, he caused the fruitless expense of considerable time and energy by the government in initiating criminal charges against O'Hara as well as deprived the citizens of an opportunity to successfully prosecute an individual guilty of criminal conduct. We believe the punishment in a case such as this should be greater than in cases where a witness has merely refused to testify before a grand jury."

The circumstances in *Patrick* are no more egregious than here. Moreover, the sentence imposed was within the permissible limits ^{impossible} for the related crimes of obstruction of justice, (18 U.S.C. § 1503), and perjury (18 U.S.C. §§ 1621, 1623). See *Green v. United States*, 356 U.S. 165, 189 (1958); see also *United States v. Mensik*, 440 F.2d 1232, 1234-35 (4th Cir. 1971). Under these circumstances, we submit that the District Court did not abuse its discretion by imposing the five year prison sentence and that sentence should be affirmed.

POINT VI

The District Court Correctly Charged the Jury.

In a somewhat convoluted fashion, Berardelli claims that Judge Bartels erroneously instructed the jury regarding the element of intent. He appears, as best we understand his argument, to contend that the Court should have instructed the jury that in order to convict Berardelli it must find a specific intent to disobey "the law" as distinguished from the court's order to testify. Berardelli also claims that Judge Bartels erred in instructing the jury that the Fifth Amendment was not a defense to the charge. As we demonstrate below, each of these claims is frivolous.

Judge Bartels instructed the jury, *inter alia*, as follows:

Now I told you next with describing the elements which you must find to be proven by the Government in order to convict you must find that this defendant disobeyed this Court Order and did so willfully and knowingly. I have also instructed you that one of the elements of the offenses that gave this defendant immunity against any testimony that he might make in the trial of the United States versus Paul Castellano except for perjury and that, "except for perjury," is in the statute and it means except if he perjures himself in the trial for which he was given immunity; nothing else.

Now, what is meant by willfully and knowingly? Let's bring it down to specifics in this case rather than talking in the abstract. I instruct you if you find beyond a reasonable doubt that this defendant understood the extent of his immunity and understood this Court's orders and consciously refused to obey those orders, then the defendant's conduct is willfull and it was knowing. Of course, if you find that he didn't understand the extent of his immunity or didn't understand the Court's orders you, of course, can't find that he willfully and knowingly disobeyed the Court's orders.

You will recall, according to the evidence in the transcript he asserted his constitutional privilege against testifying in ways that might incriminate him. You also recall that this Court granted the defendant immunity from prosecution and you will recall as I understand it from the testimony, that the defendant stated he understood that he had received immunity. After being granted immunity this defendant raised a question of self-incrimination again. I instruct you that the privilege against self-incrimination is not a

valid reason for refusing to testify in this court after this Court granted this defendant immunity. Privilege against self-incrimination is not a defense in a criminal contempt case and invoking the privilege in the earlier proceeding was no defense after the defendant was granted immunity.

Lest there be no confusion, I'd like to make that clear. You will recall that the defendant asserted certain additional grounds for his refusal to testify. These are points of law which the Court held didn't constitute valid reasons for the defendant to refuse to testify and none of these grounds present any valid defense to the present criminal contempt case, unless you find he didn't understand what his immunity was. The Fifth Amendment was not a defense because the immunity immunized him against any prosecution for statements that might incriminate him except perjury itself.

Now, the only question for you, the jury, to determine whether this defendant understood the instructions of the Court as to his immunity and that the Court by ordering him to testify, rejected the objection raised by the defendant and his counsel who was here, and that the order required him to testify and you determine whether he refused to testify after the Court gave him that order and whether he intended to refuse to testify. On reliance on the fear of prosecution for perjury or reliance on advice of his counsel is no defense for refusing to obey the Court's orders and that's why I think you ought to read the whole transcript that has been introduced into the evidence.

As I indicated, a witness, after he has been given immunity can't make his own private decision as to whether or not he is going to testify. Of course, the Government on the other hand must prove beyond a reasonable doubt that this defend-

ant refused to obey the orders of this Court knowingly and willfully and the element of knowingly and willfully depends on whether this defendant understood the extent of the immunity and understood each Court order and whether he consciously refused to obey those orders anyway. The Government contends that it met its burden of proof beyond a reasonable doubt by introducing to you the authentic transcripts of a hearing before this Court and cross-examination of Mr. Berardelli. While the defendant has a constitutional right in any proceeding as a defendant not to testify, that does not mean that he had such a constitutional right in any other proceeding such as the United States versus Castellano, et al., where he was not a defendant and was simply called as a witness and was given use immunity from prosecution to protect him from the violation of his Fifth Amendment rights not to testify. (Tr. 252-56).

A. Judge Bartels Properly Instructed the Jury Regarding the Element of Intent.

The nub of Berardelli's contention appears to be that "the Court improperly failed to instruct the jury that the defendant must have understood that his actions were against the law (as opposed to against the court's order) in order for the jury to convict him of criminal contempt." (App. Br. 22).

First, this Claim was waived by the complete failure to object to the District Court's charge on this specific ground. *United States v. Pelose*, 538 F.2d 41, 43 (2d Cir. 1976). While Berardelli claims that he "requested and was entitled to a jury instruction to this effect," (App. Br. 24), an examination of his proposed instruction reveals that it was both erroneous as a matter

of law, and not directed to the issue Berardelli now presses before this Court.¹⁸

Second, the short answer to Berardelli's present claim is that under the facts of this case, Judge Bartels' order to testify *was* "the law." No logical distinction can be drawn between that command to testify, and some higher or other order of law, which Berardelli does not even attempt to define.

As the Seventh Circuit has recently noted, "the crime of criminal contempt requires a specific intent to consciously disregard an order of the court." *United States v. Patrick, supra*, 542 F.2d at 389. If Congress had intended to require more, for example a specific intent to violate the statute, or "the law," as suggested by Berardelli, "it could have done so explicitly," *United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976). Here, as in the statute before the court in *Tolkow*, Congress did not enact such a requirement, and it follows that Berardelli's claim should be rejected by this Court.

B. Judge Bartels Correctly Charged the Jury as to the Unavailability of the Fifth Amendment as a defense.

Berardelli claims that Judge Bartels erred in instructing the jury that the privilege against self-incrimination was not a defense available to him. (App. Br. 24).

¹⁸ Appellant's request to change on this point was as follows:

Knowledge that ones act is wrongful and a purpose to nevertheless do the act, are prerequisites to criminal contempt. Good faith pursuit of a plausible though mistaken alternative is sufficient to negate the intent to commit criminal contempt. And proof beyond a reasonable doubt that the defendant possessed the required intent must be shown to convict of criminal contempt.

See *In re Brown*, 454 F.2d 999 (1971) (A. 87a).

First, contrary to his present assertion (App. Br. 25), Berardelli did not object to the court's charge on this specific ground. *United States v. Pelose*, *supra*, and thus waived the issue. Second, Judge Bartels was correct in so instructing the jury. *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973).

In a related claim, Berardelli contends that "If defendant believed he did not get sufficient immunity, he was entitled to assert the fifth amendment." (App. Br. 24). His proposed jury instruction was directed to this contention.¹⁹ While we argue here, as we did below, that Berardelli's subjective belief in the invalidity of the Court's immunity order is no defense to a charge of criminal contempt, *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947), it is clear that Berardelli has no cause to complain. The Court, on three separate occasions instructed the jury that if they found that Berardelli did not understand the extent of his immunity, then the element of willfulness was lacking. (pp. 29, 30, 31, *supra*). The jury found, as Berardelli conceded during the *Castellano* trial, (Tr. 112), that he fully understood the extent of his immunity, and it follows that this contention, too, should be rejected.

¹⁹ Concerning this point, Berardelli requested the Court to charge as follows:

If you find that the defendant under the particular circumstances of this case was confused by instructions and remarks of the Court as to the extent of the immunity granted him, that the defendant understood or misunderstood the instructions or remarks of the judge to mean that he was not completely protected from possible later prosecution, you must take such confusion, understanding or misunderstanding into consideration when deciding the question of whether defendant wilfully and knowingly disobeyed the order of the Court directing him to testify.

Hoffman v. United States, 341 U.S. 479, 486-487 (1951)
Stevens v. Marks, 383 U.S. 234, 246 (1966). (A. 87a).

CONCLUSION

**The judgment of conviction should be affirmed
in all respects.**

Dated: Brooklyn, New York
May 25, 1977

Respectfully submitted,

DAVID G. TRAGER,
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BERNARD J. FRIED,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

77-1132

Barbara Allen being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27 day of May 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
Segal & Hundley, 745 5th Ave. N.Y., N.Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

27th day of May 1977

CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41-4618278
Qualified in Queens County
Term Expires March 30, 1979

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27 day of May 19 77 he served a copy of the within
BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Robert Scarlato, 26 Court St. Bklyn, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

27th day of May 19 77

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41-4618228

Qualified in Queens Co. N.Y.
Term Expires March 19 79

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